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IN THE

Supreme Court of the United States

October Term, 1993

DAVID RONALD CHANDLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does 21 U.S.C. § 848(k), the eighth amendment, or the due process clause of the Constitution, require that the jury, in considering whether to recommend the death penalty for a § 848 defendant, be informed of the alternative sentence the defendant will receive if it chooses not to recommend death?

2. Does 21 U.S.C. § 848(l), the eighth amendment, or the due process clause of the Constitution, require that the jury, in considering whether to recommend the death penalty for a § 848 defendant, be informed of the consequences of its failing to reach a unanimous decision either in favor of or against death?

3. Does 21 U.S.C. § 848(k), (m) or (q) require the jury to make written findings of mitigating factors during the penalty phase of the proceedings and/or does § 848(q) require an appellate court to remand the case if such written findings are not returned?

4. Does 21 U.S.C. § 848 violate the eighth amendment or the due process clause under *Stringer v. Black*, ____ U.S. ____, 112 S. Ct. 1130 (1992) by including, as an aggravating factor in the jury's weighing process, the minimum death eligibility threshold set forth in *Tyson v. Arizona*, 481 U.S. 137 (1987)—the mens rea of intent or recklessness?

5. In light of the ambiguous statutory language of § 848(e), must the judge instruct the jury that it may find the defendant guilty only if it finds a direct connection between the killing and the "continuing criminal enterprise"?

6. Does 28 U.S.C. § 455(a) require recusal for judicial bias of any kind, or does it encompass only judicial bias arising from events outside judicial proceedings?

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PETITION FOR A WRIT OF CERTIORARI

DAVID RONALD CHANDLER respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 996 F.2d 1073 (11th Cir. 1993) (as modified on Sept. 30, 1993) and is reprinted in the Appendix ("App.") to this petition at A1-A55. The order of the Court of Appeals granting the government's motion for modification of the panel's opinion is reprinted at App. A56. The order of the Court of Appeals denying petitioner's motion for rehearing and suggestion of rehearing en banc is reprinted at App. A57-A58. The judgment of the United States District Court for the Northern District of Alabama as to count 3 of the indictment is reprinted

at App. A59-A60. The judgment of the District Court as to counts 1, 2 and 4-9 is reprinted at App. A61-A65. The order of the District Court denying Mr. Chandler's new trial motions as to both phases of the trial is reprinted at App. A66-A69.

STATEMENT OF JURISDICTION OF THE COURT

The judgment of the Eleventh Circuit was entered on July 1, 1993. A timely petition for rehearing and suggestion for rehearing en banc was denied on September 30, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a number of provisions within 21 U.S.C. § 848, the entirety of which is reprinted at App. A70-A83.

In addition, this case involves the following constitutional provisions:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. Amend. VIII.

> No person shall . . . be deprived of life, liberty or property without due process of the law.

U.S. CONST. Amend. V.

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

U.S. CONST. art. I, § 8, cl. 3.

STATEMENT OF THE CASE

Mr. Chandler is the first person in the country to be sentenced to death under the recently enacted federal death penalty laws set

forth in 21 U.S.C. § 848.[1] At the time of Petitioner's trial, these death penalty provisions had been employed only once before, in *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990). These provisions, enacted in November 1988, were directed toward intentional or reckless killings which occur in connection with an ongoing drug trafficking enterprise.

The Eleventh Circuit's sweeping opinion in this case, the first appellate opinion construing the statute's death penalty provisions, adopts interpretations of key statutory and constitutional issues that are both wrong and in conflict with the interpretations reached in many other cases.[2] The court of appeals held, contrary to the statutory language, that trial judges may require federal capital juries to return death penalty recommendations while remaining ignorant of the sentencing alternative—in this case, life without parole. Adopting a reading of the statute neither supported by its plain language nor advanced by either party, the court of appeals also concluded that § 848 prescribes an unprecedented procedure by which the judge must provide sentencing juries with the "option" of returning written findings of mitigating factors—the jury may then decide, at its whim, whether to fill out this section of the verdict form or not. Further, in contravention of this Court's holding in *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130 (1992), the court of appeals upheld § 848's improper insertion of *Tison v. Arizona*, 481 U.S. 137 (1987) intent/recklessness findings into the jury's death penalty weighing process as statutory aggravating factors. For these and other reasons, this case warrants immediate review by this Court.

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[1] The last time a civilian was executed for a federal offense occurred over thirty years ago, in 1962. *See Feguer v. United States*, 302 F.2d 214 (8th Cir. 1962), *cert. denied*, 371 U.S. 872 (1962).

[2] Since the enactment of section 848(e) in 1988, a total of seven prosecutions against fourteen defendants have reached death penalty hearings. *See* David Bruck, Federal Death Penalty Prosecutions, 1988-93, reprinted at App. A84-A88. An additional seven cases involving eleven defendants are currently pending under § 848(e). *Id.*

I. TRIAL PROCEEDINGS.

This case arises out of the killing of Marlin Shuler by Charles Ray Jarrell, Sr. and the government's attempt to link his death to Mr. Chandler's marijuana trafficking. Mr. Chandler's conviction was based solely on Jarrell's testimony that Mr. Chandler offered him $500 to kill Shuler. (RVI-222)[3] Prior to the trial, petitioner moved for the judge's recusal based on the judge's statement, in a pretrial order, that "Jarrell was an alcoholic lackey for Chandler who for $500, or maybe simply a fifth of liquor, likely would have done anything Chandler directed him to do." (R1-201) This motion was denied.

At the trial, Jarrell testified that, on May 8, 1990, he and Shuler each drank approximately twenty-three beers (RVII-23) and then took turns shooting at various targets, during which time Jarrell shot Shuler. (RVII-15-24) Jarrell never received any money from Mr. Chandler. (RVII-11-12) Jarrell received complete immunity from the murder charges both for himself and for his son, who was charged in state court with conspiracy to commit murder. (RXI-115-18, 123-28)

The parties presented the jury with conflicting evidence concerning why Shuler was killed. The evidence at trial established that Shuler was an alcoholic who over a period of years repeatedly battered his wife, Donna Shuler—who is Jarrell's sister. (RVI-185-86) (*E.g.*, RVI-241-42; RVII-45-46; RXI-154) Approximately five months before Jarrell actually killed Shuler, Jarrell had attempted to kill Shuler because of his continuing abuse of Donna Shuler. (RVII-40-46; RXI-109-12, 126-27)

Despite the evidence that Jarrell intended to kill Shuler for reasons that had nothing to do with Mr. Chandler, the prosecution contended that Mr. Chandler solicited Shuler's death because Shuler had provided the police with information leading to Donna Shuler's arrest for marijuana trafficking, (RX-125-29) and alleged that Donna Shuler was a member of Mr. Chandler's marijuana

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[3] Citations to the record in the trial court are to volume and page number of the record and are designated as "R" "vol. no." "page no.".

conspiracy. (RVII-63-64; RXI-156-157). Despite the conflicting motivations presented to the jury, the judge's instructions at the guilt phase were ambiguous as to whether the substantive offense of § 848(e) required a purposeful relationship between the killing and the continuing criminal enterprise or merely temporal simultaneity. (RXIII-187) The jury found Mr. Chandler guilty of the substantive offense. (RII-218-19)

At the trial and sentencing hearing, the government attempted to portray Mr. Chandler as a multiple murderer by presenting evidence concerning the disappearance of two individuals, Patrick Burrows and Jeffrey McFry. (RXIII-116; RVII-122-23, 137, 151-52; RX-48-49) Although the prosecution acknowledged that it could not prove these individuals were dead and that Mr. Chandler was not charged with their deaths, (RVI-19) it, nevertheless, argued to the jury that Mr. Chandler deserved the death penalty because he had killed them (RXV-68-69).

At the penalty phase, Mr. Chandler and the government stipulated that Mr. Chandler had no prior convictions on any felony or drug charge and that the state murder charges against Jarrell and his son in connection with the Shuler murder had been dismissed. (RXV-62, 72-73) The judge instructed the jury to return a unanimous recommendation either for or against the death penalty. (RXV-91) The court did not inform the jury of the alternative penalty Mr. Chandler would receive should it decide not to recommend death. Nor did it inform the jury of the consequences should it fail to achieve unanimity. (RII-221) Finally, the judge did not include any space on the verdict form for the jury to return findings of mitigating factors. (RII-221)

The jury found as aggravating factors that Mr. Chandler intentionally caused the death of Shuler and that he had procured the murder by promising the payment of money. (RXV-97-98) It then recommended that Mr. Chandler be sentenced to death. (RXV-99; RII-221))

II. POST-TRIAL PROCEEDINGS.

Mr. Chandler moved for a new trial and death penalty hearing on numerous grounds. The trial court held summarily that all but

one of the points "either raise matters which have earlier been argued to and rejected by the court or raise matters which have no merit and the reasons for rejecting them are self evident." App. A66.

Mr. Chandler appealed both his conviction and his sentence to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit denied Mr. Chandler's appeal for a new trial or a new death penalty hearing on all grounds. Op. at App. A1-A55. A timely motion for rehearing was summarily denied. App. A57-A58.

REASONS FOR GRANTING THE WRIT

This case presents five important questions concerning § 848 for this Court's review.[4] Every trial court presiding over a sentencing hearing under § 848(e) must address all five of these questions. Courts have already split on a number of them. The intervention of this Court is, therefore, needed now to secure the uniform administration of the law.

This is not a state habeas corpus appeal implicating the concerns of comity and federalism. Rather, is the direct appeal of the first death sentence ever to be handed down under § 848—a statute that falls solely under the province of the federal judiciary. This Court bears ultimate responsibility for the sound administration of federal death penalty laws and, accordingly, should grant Mr. Chandler's petition before numerous resentencing hearings become necessary and, more importantly, before Mr. Chandler is illegally executed simply because his case preceded the development of an inter-circuit conflict.

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[4] In addition, this petition raises, in Part VI, an important interpretational question concerning whether the federal recusal provision set forth in 28 U.S.C. § 455(a) requires recusal for any kind of bias, or only for bias arising from extrajudicial circumstances. This Court has granted certiorari in *Liteky v. United States*, _____ U.S. ____, 113 S.Ct. 2412 (1993) to address this identical issue and should, therefore, grant certiorari or hold this case pending the outcome of *Liteky*.

I. THIS COURT SHOULD DETERMINE WHETHER § 848(k), THE EIGHTH AMENDMENT, OR THE DUE PROCESS CLAUSE OF THE CONSTITUTION REQUIRES THAT SENTENCING JURIES BE INFORMED OF THE ALTERNATIVE SENTENCE THE DEFENDANT WILL RECEIVE SHOULD THEY DECIDE NOT TO RECOMMEND DEATH.[5]

Section 848(k) provides that, once the jury makes certain threshold findings of statutory aggravating factors, it must weigh aggravating and mitigating factors to decide whether to recommend "that a sentence of death shall be imposed *rather than a sentence of life imprisonment without possibility of release or some other lesser sentence*". 21 U.S.C. § 848(k) (emphasis supplied). This statutory provision expressly requires the jury to recommend death only if it concludes that death is preferable to an alternative sentence.

The district court in this case, however, failed to instruct Mr. Chandler's sentencing jury that his alternative sentence would be life without parole.[6] (RXV-19-20) Not only did the district court fail to provide the jury with any information concerning Mr. Chandler's alternative sentence, but it three times instructed the jury that it should not "be concerned with the question of what sentence the defendant might receive in the event you

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[5] This Court has granted certiorari in *Simmons v. South Carolina*, ___ U.S. ___, 114 S. Ct. 57 (1993) to decide whether the eighth amendment and due process clause require accurate alternative sentencing instructions in capital cases. Because of the related issues in *Simmons*, which concerns whether the trial court may withhold information concerning eligibility for parole, and this case, which concerns whether the trial court may completely withhold alternative sentencing information, the Court should either grant certiorari or hold this case pending the outcome of *Simmons*.

[6] *See* Federal Sentencing Guidelines Manual Section 2A1.1 (1990 ed.) (life without parole is the minimum sentence allowable for the substantive offense of which Mr. Chandler was convicted).

determine not to recommend a death sentence".(RXV-85; *see also* RXV 20, 87)[7]

The Eleventh Circuit upheld this procedure, stating: "[n]othing in Section 848 requires the jury to be informed of what sentence the defendant might receive in the absence of death." Op. at App. A14. This construction of § 848(k) conflicts with the plain language of § 848(k), with its legislative history, and with the interpretation of that section by three other district courts.[8] In addition, the failure of the district court to inform the jury of the alternative sentence violates Mr. Chandler's rights under the

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[7] Defense counsel submitted a proposed instruction which would have informed the jury of the life option. (Defendant's Requested Instruction No. A-12 (RII-220)) After the jury charge, counsel objected to the court's failure to give his proposed instructions (RXV-93-94).

[8] In *United States v. Pitera* and *United States v. Tipton* the district courts instructed the jury that the defendant would receive a life sentence without possibility of release if the jury recommended against the death penalty and instructed the jury to consider that fact as a mitigating circumstance. *See United States v. Pitera*, No. 90-CR-424, Penalty Phase Jury Instructions, Special Findings (E.D.N.Y. Special Findings filed Jul. 6, 1992); *United States v. Tipton*, No. 3:92CR68 Trial Transcript at 3978, Special Findings (E.D. Va. Special Findings filed Feb. 16, 1993). In *United States v. Cooper*, the Court informed the jury that the defendant faced a presumptive sentence of life without parole if not sentenced to death. *United States v. Cooper*, No. 89-CR-580 (N.D. Ill. Sentencing Hearing Jury Instructions filed Mar. 20, 1991).

Moreover, Mr. Chandler is the *only* defendant, in all seven cases to reach death penalty hearings, who has been sentenced to death by a jury that deliberated in complete ignorance of the alternative sentence. In the remaining cases, the jury either heard unopposed evidence as to the alternative sentence, *see United States v. Garza*, Cr. No. B-93-009 (S.D. Tex. Special Findings filed Jul. 31, 1993), found the alternative sentence of life without the possibility of release to be a mitigating factor, *see United States v. Hutching*, No. CR-92-32-S, Special Findings with respect to defendants Hutching, Molina and McCullah (E.D. Okla. Special Findings filed Mar. 17, 1993, Mar. 19, 1993 and Mar. 21, 1993), or failed to find two aggravating factors and, thus, did not reach this stage in the analysis. *See United States v. Villarreal*, No. 9:91CR4 (E.D. Tex. Special Findings filed Jul. 1, 1991).

Petitioner will lodge copies of the relevant portions of cited unpublished case materials with the Court.

due process clause and the eighth amendment. Finally, this erroneous jury charge is of particular concern in light of the wealth of empirical data indicating that jurors fear the early release of capital offenders and that this fear is a powerful factor weighing in favor of recommendations of death.[9]

A. Section 848(k) Requires Sentencing Juries To Choose between Death and the Alternative Sentence to Death.

The plain language of subsection (k) requires the jury to choose between death and the alternative sentence to death. Section 848(k) directs the jury to find and weigh aggravating and mitigating factors. The statute then explicitly states:

> "Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed *rather than a sentence of life imprisonment without possibility of release or some other lesser sentence*."

21 U.S.C. §848(k) (emphasis supplied).

The Eleventh Circuit's construction of § 848 simply ignores the established principle that "[i]n construing a statute we are obligated to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The

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[9] *See* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (Nov. 1993); William J. Bowers, *Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 Law & Soc. Rev. 157, 169-70 (1993); James A. Fox, Michael L. Radelet & Julie L. Bonsteel, *Death Penalty Opinion in the Post Furman Years*, 18 N.Y.U. Rev. L. & Soc. Change 499, 513-515 n. 63-64 & 66, 525 (1990-91); Marshall Dayan, Robert S. Mahler & M. Gordon Widenhouse, Jr., *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 Loy. L.A. Rev. 151, 166-171 (1989); Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211, 222-23 (1987). In the studies cited above, however, the juries received some alternative sentencing information. The fear of release was probably much greater for jurors serving in Mr. Chandler's case because death was the only sentence which the jury could choose with any certainty.

Eleventh Circuit's holding treats the above quoted sentence as though it merely directs the jury to determine whether "a sentence of death shall be imposed". This deprives the second part of the sentence of any meaning and thereby violates established principles of statutory interpretation. The inclusion of the language "rather than a sentence of life imprisonment without possibility of release or some other lesser sentence" clearly directs the sentencer to make a relative choice in recommending death.

This is made unmistakably clear by the legislative history of subsection (k). As initially introduced in the Senate, the subsection, that would eventually become 21 U.S.C. § 848(k), required the jury to simply return a "finding as to whether a sentence of death is justified". S. 2455, 100th Cong., 2d Sess. § 1(k) (1988), reprinted at App. A89.

That legislative proposal, which is consistent with the Eleventh Circuit's holding, was decisively rejected by Congress. Congress deleted the language which merely asks whether a sentence of death "is justified" and substituted the phrase "rather than a sentence of life imprisonment without possibility of release or some other lesser sentence". 134 Cong. Rec. S16187 (daily ed. Oct. 14, 1988). During floor debates on June 9, 1988, Senator Levin had criticized the bill's earlier use of the term "justified", pointing out that the bill as drafted

> "tilts the balance towards the death penalty, because it is very possible that a death penalty could be justified in the eyes of all of the jurors but those same jurors could say that a life sentence without parole is also justified."

134 Cong. Rec. S7489 (daily ed. June 9, 1988). He remarked that under the bill jurors "are not asked which sentence they prefer". *Id.* at S7483. Arguing that he had never seen another death penalty statute drafted in that fashion, Senator Levin recommended that the bill be modified. *Id.* at S7489.

Subsequently, Senator D'Amato announced to the Senate that he had accepted Senator Levin's position, 134 Cong. Rec. S16042 (daily ed. Oct. 14, 1988), and subsection (k) was amended to its

present form. 134 Cong. Rec. S16187 (daily ed. Oct. 14, 1988). Senator Levin claimed credit for the amendment and explained that the amended statute requires a choice between alternatives:

> "From our own common experiences, we can see that there is a difference between justify and recommend. Take, for example, someone takes their pet to a veterinarian and is told that the animal is very sick. The vet might say that it would be justified to put the animal to sleep. But the vet might also say that it would be justified to utilize some medical intervention to keep the animal alive for another 6 months. Many pet owners would then ask, 'But doctor, what do you recommend?' Justify is a much broader concept than recommend and legislation which imposes a penalty as severe as the death penalty should recognize that important distinction. That is why two amendments in the package change this to require the jury to recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without a possibility of release or some other lesser sentence."

134 Cong. Rec. S16001 (daily ed. Oct 14, 1988). The purpose of the amendment, according to its sponsor, was to force the sentencer to choose between death and the alternatives to death.

This legislative history leaves no doubt that Congress meant what it said in 848(k): a capital sentencing jury in recommending death must find that death is preferable to life without parole or some other lesser sentence, and its deliberations may not be artificially channeled to a recommendation of death.

B. The District Court's Failure To Instruct the Jury Concerning the Alternative Sentence Violated Mr. Chandler's Rights under the Fifth and Eighth Amendments.

The district court's instructions to the jury essentially required it to make a choice between death and some unknown sentence which would lie in the judge's discretion. The failure of the judge to provide a choice between known alternatives, therefore raises

two constitutional issues that were improperly addressed by the Eleventh Circuit.

First, the jury's unwarranted fear of the defendant's early release may have acted as an arbitrary factor in the sentencing process—needlessly pressuring the jurors to impose the death penalty in violation of the eighth amendment.[10] Second, the failure to provide this alternative sentencing information violated the fifth and eighth amendments by effectively preventing Mr. Chandler from presenting mitigating evidence concerning his lack of dangerousness.[11]

The district's court instructions gave the jurors a Hobson's choice of either imposing death—the ultimate penalty and in this case the *only* penalty which the jury could impose—or deferring to the district court's sentencing discretion—an option which, as far as the jury knew, included the possibility of the defendant's early release.

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[10] *See Simmons v. South Carolina*, ___ U.S. ___, 114 S. Ct. 57 (1993) (granting certiorari on question of whether fifth or eighth amendment was violated by trial court's failure to disclose to jury that alternative sentence of life imprisonment means *life without parole*); *Beck v. Alabama*, 447 U.S. 625 (1980) (statute precluding juries from returning convictions for lesser included offenses in capital cases violated eighth amendment).

[11] *See Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986), (alternative sentencing information may constitute mitigating evidence "in the sense that [it] might serve 'as a basis for a sentence less than death'"), *quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). *Cf. California v. Ramos*, 463 U.S. 992, 1008 and n.22 (1983) (information concerning parole is relevant to the issue of potential dangerousness).

II. THIS COURT SHOULD GRANT MR. CHANDLER'S PETITION IN ORDER TO RESOLVE A CONFLICT CONCERNING WHETHER § 848 OR THE FIFTH OR EIGHTH AMENDMENT REQUIRES TRIAL COURTS TO ACCURATELY INFORM CAPITAL SENTENCING JURIES AS TO THE CONSEQUENCES OF A FAILURE TO REACH A UNANIMOUS DECISION.

Under the statutory regime of § 848, any juror, who believes that the death penalty is unwarranted in a particular case, may prevent the imposition of that penalty by refusing to vote in favor of a death recommendation.[12] Despite the obvious intent of § 848 to allow the death penalty to be imposed only upon the unanimous recommendation of all jurors, the district court failed to instruct the jury concerning the consequences of a failure to reach unanimity. Indeed, the district court's verdict form and jury charge potentially mislead the jury by requiring a unanimous recommendation either *for or against* a sentence of death. (Special Findings, RII-22; RXV-91) The charge further impelled unanimity through the inclusion of an *Allen* charge in the initial instructions.[13]

The Eleventh Circuit upheld both the charge and verdict forms. The appellate court recognized that § 848(l) precludes the district court from holding a new sentencing hearing or imposing a sentence of death in the event the sentencing jury fails to reach a unanimous recommendation. Op. at App. A18. Yet, it went on to hold that some presumed "general interest . . . in unanimous

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[12] Section 848 (k) provides that a jury's recommendation of a death sentence must be "by unanimous vote". Section 848(l) then requires the imposition of a non-death sentence in the event the jury fails to reach a unanimous recommendation:

> "Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence other than death, authorized by law."

21 U.S.C. § 848(l).

[13] (RXV-87) *See Allen v. United States*, 164 U.S. 492 (1896).

verdicts" justified withholding from the jury an instruction which would have made clear the mandates of § 848(l)—that a person may not be executed if any juror opposes the death sentence. Op. at App. A20-A21.[14] The Eleventh Circuit's interpretation simply does not comport with the statutory requirements of § 848 (k) and (l).

Further, it conflicts with the procedure implemented by all of the other district courts which have held death penalty hearings under Section 848(e). In *United States v. Tipton*, No. 3:92CR68, Instruction No. 5 (E.D. Va.), for instance, the United States District Court for the Eastern District of Virginia explained:

> "In short, if you find, after thorough deliberation, that you are *not* unanimous in your views, you have nevertheless reached a decision—namely, that the government has not met its burden of proof as to the death penalty."

See Tipton Jury Charge at 21-21, 34-35.[15]

Finally, even if § 848, itself, does not entitle Mr. Chandler to an instruction concerning the consequences of a single juror's vote against death, the question arises as to whether the fifth and eighth amendments do. Although this Court has approved jury

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[14] The Court went on to make the unsupported suggestion that the error was harmless, Op. at App. A21, without even considering whether the prosecution had met its burden of establishing harmlessness beyond a reasonable doubt as required by *Chapman v. California*, 386 U.S. 18, 24 (1967)—an effort which the prosecution did not even attempt below. *See* Appellee's Brief at 44-48.

[15] *See also, United States v. Cooper*, No. 89-CR-580 (N.D. Ill. Jury Instructions filed Mar. 20, 1991) (prosecution expressly sought, and court gave, the instruction which Mr. Chandler requested); *Id.* (Special Findings, Decision Form C, filed Mar. 15, 1991) (allowing jury to return nonunanimous verdict); *Pitera*, No. 90-CR-424 (E.D.N.Y. Special Findings, Decision Form C, filed Jul. 6, 1992); *Villarreal*, No. 9:91CR4(02) (E.D. Tex. Special Findings, Decision Form A, filed Jul. 1, 1991); *Garza*, Cr. No. B-93-009 (S.D. Tex. Special Findings filed Jul. 31, 1993) (jury asked to answer "yes" or "no" to question of whether they unanimously recommend a death sentence); *Hutching*, No. CR-92-32-S (E.D. Okla. Special Findings, Decision Form C, filed Mar. 17, 1993).

instructions to continue deliberating in the context of capital sentencing hearings, *Lowenfield v. Phelps*, 484 U.S. 231 (1988), it has never addressed the question of whether the interest in unanimity justifies *misinforming* the sentencing jury as to the consequences of their failing to reach a unanimous recommendation. As noted above, the Eleventh Circuit's holding departs from the procedures implemented by the other district courts that have presided over § 848 death penalty prosecutions. Further, even in their review of state cases, the Federal Circuit Courts are divided on the question of whether misleading or ambiguous unanimity charges violate the due process clause or the eighth amendment by introducing arbitrariness into the sentencing process, fostering jury unanimity through confusion.[16] This Court should, therefore, grant certiorari to resolve these issues which implicate both the statutory interpretation of § 848 and the constitutional implementation of death penalty statutes overall.

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[16] *See Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir. 1989) (reversing a death sentence because the "jurors were never expressly informed in plain and simple language that if even one juror believed that the death penalty should not be imposed, Robert Kubat would not be sentenced to death"), *cert. denied*, 493 U.S. 874 (1989); *Gaskins v. McKellar*, 916 F.2d 941, 955 (4th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2277 (1991) (concluding that a charge erroneously requiring unanimity for or against the death penalty did not affect the jury's decision). *Cf. Mak v. Blodgett*, 970 F.2d 614, 625 (9th Cir. 1992) (affirming grant of habeas petition where a portion of the jury charge required that jurors unanimously vote against death); *cert. denied*, __ U.S. __, 113 S. Ct. 1363 (1993); *Evans v. Thompson*, 881 F.2d 117, 124 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990) (in dictum stating that unanimity instructions are proper, while noting that the trial court had explained the consequences of a failure to reach a unanimous recommendation).

III. THIS COURT SHOULD ESTABLISH, DEFINITIVELY, WHETHER 21 U.S.C. § 848(k) AND (m) REQUIRE THE JURY TO MAKE WRITTEN FINDINGS OF MITIGATING FACTORS DURING THE PENALTY PHASE OF A TRIAL AND WHETHER § 848(q) MANDATES A REMAND WHERE THE JURY DOES NOT RETURN SUCH WRITTEN FINDINGS .

Contrary to both the express statutory directive of § 848 (k), and to the procedure implemented by every other court which has held a § 848 death penalty hearing,[17] the trial court here failed to include a section on the verdict form for the jury to return findings of the relevant mitigating factors. The Eleventh Circuit, in upholding this defective procedure, made two significant errors.

First, it ignored the express statutory directive set forth in § 848(q). Subsection (q) provides:

> "The [appellate] court shall affirm the sentence if it determines that . . . (B) the information supports the special finding of every aggravating factor upon which the sentence was based, together with, *or the failure to find, any mitigating factors* as set forth or allowed by this section.
>
> "In all other cases the court shall remand the case for reconsideration under this section". (Emphasis supplied)

Section 848(q) mandates appellate review of written findings of aggravating and mitigating factors and requires a remand in the absence of such findings.

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[17] All six other trial courts included a section for written findings of mitigating factors on the verdict form. *See United States v. Cooper*, No. 89-CR-580 (N.D. Ill. Special Findings filed Mar. 20, 1991); *United States v. Garza*, Cr. No. B-93-009 (S.D. Tex. Special Findings filed July 31, 1993), *United States v. Hutching*, No. CR-92-32-S (E.D. Okla. Special Findings filed Mar. 17, 1993); *United States v. Pitera*, No. 90-CR-424 (E.D.N.Y. Special Findings filed Jul. 6, 1992); *United States v. Tipton*, No. 3:92CR68 (E.D. Va. Special Findings filed Feb. 16, 1993); *United States v Villarreal*, No. 9:91CR4 (E.D. Tex. Special Findings filed Jul. 1, 1991).

Second, adopting a bizarre interpretation of § 848, not advanced by either party, the Eleventh Circuit held that § 848(k) merely requires the judge to give the jury the "option" of returning written mitigating factor findings but does not require that such findings be made. This Court should grant certiorari to correct these statutory errors.

A. Section 848(q) Requires the Appellate Court to Remand the Case Where the Jury Does Not Return Written Findings of Mitigating Factors.

The Eleventh Circuit erroneously ruled that "there is nothing in [subsection (q)] altering our ordinary standards of review". Op. at App. A9. It then held under § 848(k) that the statute does not require written findings of mitigating factors, but merely gives the jury the "option" of making such findings. Op. at App. A15. It further ruled that § 848(q) is only implicated if the jury decides to exercise this option. Op. at App. A16. Finally it held that the failure of the trial court to provide the jury with this option was plain error, Op. at App. A17, but did not justify a remand under Fed. R. Crim. P. 52 because of its conclusion that the error would not have changed the outcome of the sentencing hearing. Op. at App. A18.

The strictures of Rule 52, however, are simply irrelevant where, as here, Congress has mandated a specific level of appellate review. Section 848(q) affirmatively requires that the appellate court independently review the information underlying each finding of an aggravating factor and each failure to find a mitigating factor to determine whether it is supported by the information presented at the sentencing hearing. The statute's affirmative requirements mandating appellate review are not made contingent upon defendant's objections at the trial level.

Section 848(q) requires that the case be remanded where the appellate court cannot determine that the information supports every finding of an aggravating factor and every failure to find a mitigating factor. Where no mitigating factor findings are returned by the jury, the appellate court cannot determine what mitigating factors were or were not found, and certainly cannot

ascertain whether any failure to find such factors was supported by the record.

Section 848(q) does not authorize independent reweighing or plain error analysis by the appellate court. Where the trial court's findings are incomplete, it requires a remand. To this extent the statutory level of appellate protection provided in § 848 is more comprehensive than the level of appellate protection generally afforded by the eighth amendment, the due process clause, and Rule 52.[18] Congress' express decision to require appellate courts to perform a specifically mandated appellate review in § 848 should be respected by the courts, not eviscerated by resort to the doctrine of plain error embodied in Rule 52.

B. The Appellate Court Erred in Ruling that § 848(k) Merely Provides the Jury with the "Option" of Returning Written Mitigating Factor Findings.

Section 848(k), entitled "Return of findings", provides, in relevant part:

> "The jury . . . shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If [two or more statutory aggravating factors are] found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur

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[18] The eighth amendment and due process clause require, at minimum, appellate reweighing or harmless error analysis. *See Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130, 1137 (1992) (where a defect in findings of aggravating or mitigating factors is present, baseline level of constitutional protection requires "harmless-error analysis" or "reweighing" of factors by the appellate court); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (appellate reweighing only appropriate where circumstances of case would not render such reweighing "extremely speculative or impossible").

that the factor has been established. A finding with respect to any aggravating factor must be unanimous."

The defense argued that § 848(k) requires written findings of mitigating, as well as aggravating factors. The prosecution argued, conversely, that this section only requires written findings of aggravating factors, but not of mitigating factors. The Eleventh Circuit, adopting an interpretation that was not advanced by either party, and which is at odds with both the statute and the position of all other courts to deal with the issue, *see supra* n.17, held that "[s]ection 848 requires that the jury be instructed that it has the option to return written findings of mitigating factors if it so chooses, but that it does not require the return of such findings". Op. at App. A16.

Despite the considerable diversity of capital sentencing schemes, no state follows the procedure contemplated by the panel opinion. Nor, to the knowledge of defense counsel, do federal courts permit juries to decide whether to complete jury interrogatories in any other circumstance.[19]

The Eleventh Circuit's erroneous ruling on this issue is based on a flawed reading of the use of the term "may" instead of "shall" in connection with mitigating factor findings. The Eleventh Circuit reasoned that mitigating factor findings are optional because the statute uses the word "may" in connection with mitigation findings while it uses the word "shall" in connection with statutory aggravating factors. Op. at App. A15-A-16)

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[19] Moreover, rather than relying on legislative history, the panel engages in judicial speculation when it claims that Congress was concerned that the process of preparing written mitigation findings is coercive. Op. at App. A16-A17. The congressional debates are silent on this issue. Nor did the panel explain why written findings are more coercive than oral deliberations. To the contrary, returning written findings ensures that each mitigating factor is carefully considered and that the jury deliberations are not necessarily concentrated on the consideration of aggravating factors as will be the inevitable tendency when the jury is asked to focus on writing down aggravating, but not mitigating, factors.

A close reading of the statutory language, however, reveals that the Eleventh Circuit misconstrued the grammar of § 848(k). The use of the term "may" in § 848(k) was, in fact, intended to direct the jury to return findings of mitigating factors if such factors were found to exist and not to return such findings if they were not found to exist.

Subsection (k) states that the jury "shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist". This sentence directs the jury to return findings of aggravating factors if the jury finds that they exist. In other words, the jury *may* return aggravating findings, depending upon whether they are found to exist.

Section 848(k) then proceeds to use the word "may" with respect to findings of non-statutory *aggravating factors*[20] and with respect to *mitigating factors*, but drops the phrase "found to exist". Read in light of subsection (q)'s unequivocal direction that appellate courts review "*every* aggravating factor", there is no question that the jury is required to return written findings of any non-statutory aggravating factors that it has found. The omission of the conditional language "found to exist" from this sentence of subsection (k) explains the use of "may", rather than "shall". "May" means the same thing in both the second and the third sentences of § 848(k), and has the same effect that "shall" has in the first sentence—the return of a finding is required if, but *only* if, any particular factor is found to exist.

Another reason Congress chose to use the terms "shall" in one instance and "may" in the other is that findings of statutory aggravating factors are necessary conditions to the imposition of a death sentence, whereas findings of non-statutory mitigating factors are not. The differing use of these terms is the result of the differing function of aggravating and mitigating factors in a

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[20] If the jury finds two statutory aggravating factors, "a special finding identifying any other aggravating factor for which notice has been provided under Subsection (h)(1)(B) of this section, *may* be returned." § 848(k) (emphasis added).

death penalty sentencing scheme and the varying contexts in which the terms are used. There is, thus, nothing in the grammar of § 848(k) to support the Eleventh Circuit's view that aggravating factors must be found in writing, but mitigating factors need not, depending on a particular jury's predisposition.

The only other linguistic distinction that the appellate court relied upon is the omission of the word "special" from the sentence concerning mitigating factors. Op. at App. A16. The omission is insignificant, given that subsection (k) is entitled "Return of Findings" and twice refers to findings of aggravating factors as "findings" rather than "special findings", thus reflecting Congress's synonymous treatment of the terms.[21]

Finally, in addition to being supported by the plain meaning of § 848(k), petitioner's position is thoroughly supported by the spirit of § 848. It is simply inconsistent with Congress' intent to accord mitigating factors the highest level of consideration—as evidenced by the lower proof standards of §§ 848(j) and (k) and the specifically mandated appellate review procedure provision of § 848(q)—to find that such written findings were intended to be "optional". Such a reading negates much of the precautionary care that characterizes the provisions of § 848 relating to mitigating factors.

C. The Eleventh Circuit's Statement that Defendant Waived these Arguments Is Not a Bar to this Court's Review.

In addition to rendering erroneous substantive rulings concerning both § 848(q) and § 848(k), the Eleventh Circuit misapplied the rules relating to the preservation of errors by counsel and the appropriate standard of review. Accordingly, waiver should not be a bar to this Court's granting certiorari.

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[21] Section 848(k) provides, in part:

"A *finding* with respect to any aggravating factor must be unanimous . . . . The jury or the court, regardless of its *findings* with respect to aggravating and mitigating factors, is never required to impose a death sentence . . . ." (emphasis supplied)

First, as argued above, § 848(q)—not Rule 52 or the case law governing the constitutional standard of review in death penalty cases—controls the standard of appellate review in this case. Because that section mandates a remand where mitigating factor findings are not returned, the appellate court should have remanded the case for written mitigating factor findings without referring to Rule 52.

Second, even if Rule 52 is found to be relevant, the appellate court erred in ruling that trial counsel had not preserved the error. Op. at App. A14-A15.[22]

Finally, even if trial counsel did not adequately preserve the error as a technical matter, it should, nonetheless, be corrected under *United States v. Olano*, ___ U.S. ___, 113 S. Ct. 1770, 1779 (1993) ("the Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings'").

Sentencing Mr. Chandler to death, without even bothering to require the jury to return mitigating factor findings, eviscerates his statutorily guaranteed right to appellate review of mitigating factors provided in § 848(q). So significant an error will necessarily have a significant effect upon the fairness, integrity and public reputation of these judicial proceedings.

That conclusion is particularly warranted here because Mr. Chandler was only the second person ever to undergo a death

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[22] The Eleventh Circuit should have treated the issue as preserved by either defense counsel's proposed instructions requiring the jury to find mitigating factors (m) (6) and (m) (8) (Defendant's Requested Instructions Nos. a-5 and a-6 (RII-220))—which, if granted, would have preserved the error—or defense counsel's objection in his Memorandum in Support of David Ronald Chandler's Post-Trial Motions (RXVIII-257a at 15, 17, 22, 23), in response to which neither the district court nor the prosecution claimed that defense counsel had waived this issue. (Order, May 30, 1991 (RII-259); Government's Response to Defendant's Motion for New Trial (RII-257)).

penalty hearing under § 848.[23] Mr. Chandler should not be executed as a result of counsel's failure to object because Mr. Chandler was tried under this untested and complicated statute. *Cf. United States v. McCall*, 915 F.2d 811, 814 (2d Cir. 1990) (excusing counsel's failure to object where issue was of first impression under the federal sentencing guidelines); *United States v. Taylor*, 868 F.2d 125, 126 (5th Cir. 1989) (same).

In Mr. Chandler's case, at least one mitigating factor was supported by uncontested evidence (that Mr. Chandler "did not have a significant prior criminal record", see § 848(m)(6)), while two others were supported by substantial evidence.[24] Because the jury, in this case, however, was not asked to make any written findings of mitigating factors, the appellate court could not know whether the jury found that these mitigating factors existed or whether they considered them in the weighing process. (Special Findings (RII-221)) Further, because the evidence supporting the existence of the above three mitigating factors was strong, any error by the jury in failing to make such findings would certainly be prejudicial. This Court should grant certiorari to address this important question—which will certainly arise in the future—and to ensure that all § 848 defendants, including Mr. Chandler, are treated uniformly.

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[23] *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990) was the only case which preceded this case.

[24] These factors were § 848(m)(8) ("Another defendant . . . equally culpable in the crime, will not be punished by death") and § 848(m)(10) ("That other factors in the defendant's background or character mitigate against imposition of the death sentence"). In this case, the person who actually committed the murder, Jarrell, was not only not being punished by death, but, in fact, received complete immunity from the murder charge. In addition, there was substantial evidence that Mr. Chandler was devoted to his family.

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONALITY OF SECTION 848'S USE OF THE MINIMUM THRESHOLD DEATH ELIGIBILITY REQUIREMENT OF *TISON V. ARIZONA* AS AN AGGRAVATING FACTOR.

Section 848(k) requires the jury to weigh aggravating and mitigating factors to determine whether to recommend a sentence of death. The first statutory "aggravating factor" set forth in § 848(n) is intentional or reckless killing—the minimum mens rea necessary to render a person eligible for the death penalty under *Tison v. Arizona*, 481 U.S. 137 (1987). The Eleventh Circuit disregarded this Court's holding in *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130 (1992) when it held that it was appropriate to include this overly broad factor in the jury's death penalty weighing process. *See* Op. at App. A26-A28.

The overbreadth of the (n)(1) factor is obvious. Virtually every murderer or felony-murderer possesses one of the four (n)(1) aggravating circumstances, which define the minimum threshold for capital murder under the eighth amendment. *See Enmund v. Florida*, 458 U.S. 782 (1982), *Tison v. Arizona*, 481 U.S. 137 (1987). Accordingly, Subsection (n)(1) does not serve to narrow the class of persons to those who should, on some rational basis, be selected for execution.

This Court has ruled many times that a death penalty statute cannot include aggravating factors which fail to meaningfully narrow the class of murderers eligible for the death penalty. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court invalidated the death sentence where the jury considered, as an aggravating factor, that the killing was "outrageously or wantonly vile, horrible or inhuman". This Court held that because the jurors might find any murder to be "outrageously or wantonly vile, horrible or inhuman", this factor failed to perform the

constitutionally required narrowing function and was inappropriately used as an aggravating factor.[25]

The "intent/recklessness" factor of 848(n)(1) is even broader than the factors found invalid in *Godfrey* and *Maynard* because it encompasses all persons eligible for the death penalty under *Tison*. As this court noted in *Arave v. Creech*, ___ U.S. ___, 113 S. Ct. 1534, 1542 (1993), "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm". (emphasis supplied) *See also Maynard*, 486 U.S. at 365. The § 848(n)(1) factor is clearly too broad to serve as a legitimate aggravating factor in a death penalty statute.

The Eleventh Circuit, however, held that the "intent/recklessness" factor in § 848 did not render the statute defective, citing *Lowenfield v. Phelps*, 484 U.S. 231 (1988) for the proposition that the use and definition of aggravating factors need not undergo constitutional scrutiny if the narrowing function is adequately performed through the definition of the substantive offense. Op. at. App. A26-A28. This argument is entirely irrelevant, however, because *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130, 1137-38 (1992) made *Lowenfield* expressly inapplicable to statutes, such as § 848, which utilize a "weighing process" to determine whether a defendant should receive the death penalty.[26]

Although a § 848 jury must find at least one other aggravating factor, in addition to the "intent/recklessness" factor, in order to recommend death, the inclusion of "intent/recklessness" as an

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[25] *Accord Maynard v. Cartwright*, 486 U.S. 356 (1988) (aggravating factor defined as killing which was "especially heinous, atrocious, or cruel" found invalid as vague and overbroad); *Clemons v. Mississippi*, 494 U.S. 738 (1990).

[26] Both the Mississippi statute evaluated in *Stringer* and death penalty provisions of § 848 define a subset of all murders as capital murder and then require the jury to weigh aggravating against mitigating factors to determine whether a particular defendant should receive the death penalty.

aggravating factor fatally skews the weighing process. As this Court noted in *Stringer v. Black*:

> "A vague aggravating factor used in the weighing process is in a sense worse [than its use as a threshold factor to determine eligibility for the death penalty], for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. . . . [T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty."

Stringer, at 1139.

Stringer v. Black is controlling precedent in this case and requires that the overly broad "intent/recklessness" factor be removed from the weighing process. This Court's swift action in addressing this problem is needed to ensure that no one is executed under a defective statutory procedure which leaves open the risk of federally imposed death sentences in violation of the eighth amendment.

V. SIGNIFICANT QUESTIONS ARE RAISED BY SECTION 848'S AMBIGUOUS DEFINITION OF THE OFFENSE AND THE TRIAL COURT'S FAILURE TO CLARIFY THAT AMBIGUITY IN ITS JURY INSTRUCTIONS.

Congress enacted § 848(e)(1)(A) to permit the imposition of the death penalty upon individuals who, while working in a continuing criminal enterprise, commit a murder *in connection with that enterprise*. Senator D'Amato, the sponsor of the bill in the Senate, described it as follows:

> "This legislation has been carefully crafted, Mr. President. It does not, as some suggest, say death to the drug dealers. But it does say very carefully that if you are involved in giving orders *to take another life in connection with a criminal conspiracy*, or if you execute that, order that you may be charged with appropriate punishment which can be the death penalty."

134 Cong. Rec. S7416 (daily ed. June 8, 1988) (emphasis added).

Unfortunately, the statute, as written, only requires that a murder be committed during the same time period that a person is engaged in a continuing criminal enterprise. It does not require a causal or purposeful connection between the two. The language is as follows:

> "Any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results . . . may be sentenced to death."

As a matter of plain English, the words "working in furtherance" modify the word "person"; they do not modify the phrase "intentionally kills". In other words, the sentence does not require that the killing be done "in furtherance" of the criminal enterprise, but merely that the person be engaged in or working in furtherance of the enterprise at the time he commits an intentional killing.

This flaw in the statutory language was noted in *United States v. Whiting*, 771 F. Supp. 476, 477 (D. Mass. 1991):

> "The statute is open to the interpretation that all that the government need prove is temporal coincidence. The killing might result from a bar brawl, domestic discord, or an unrelated robbery, even though the defendant was coincidentally engaging in a CCE at the same time."

Because such an interpretation would render the statute unconstitutional under the commerce clause,[27] the court, in *Whiting*, interpreted this section "to deal only with intentional

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[27] The literal interpretation of the statute would violate the commerce clause because Congress does not have the power to criminalize conduct "unrelated to commerce or any of the other areas committed to Congress by the Constitution." *Whiting*, 771 F. Supp. at 477.

killings that were directly related to the drug traffic, and in particular the CCE". *Id.*

In this case, the government, the Eleventh Circuit and the defendant are all in agreement that, despite the misleading statutory language, § 848(e) should be construed to criminalize only those killings which were done in furtherance of a continuing criminal enterprise. The disagreement arises as to whether the jury instructions were sufficiently clear so as to ensure that the statute was constitutionally applied in this case.[28]

The trial judge essentially read the ambiguous words of the statute to the jury, instructing that, in order to find the defendant guilty under § 848(e), it needed to find

> "that while engaging in or working in furtherance of the Continuing Criminal Enterprise charged in Count 2, the defendant either killed Marlin Shuler or commanded, induced, procured or caused the intentional killing of Marlin Shuler, as charged in count 3." (RXIII-187)

The Eleventh Circuit held that these instructions were sufficient. Op. at App. A36-A37. This slightly alternative phrasing, however, and the use of the word "while", do nothing to clarify the statute. The term "while" implies only temporal simultaneity, it does not convey the requirement of a causal or purposeful connection between the killing and the criminal enterprise. *See* Black's Law Dictionary 1596 (6th ed. 1990) ("while" is a "word of time and not of causation").

The jury instructions were, thus, ambiguous at best. The jury could have interpreted these words in accordance with their natural meaning as a matter of plain English and not in the causal manner necessary to render the statute constitutional. The possibility that the jury interpreted these words in a way as to

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[28] Likewise, because the same ambiguous phrasing was used in the indictment, the grand jury may have based its decision on the same erroneous interpretation. *See United States v. Carll*, 105 U.S. 611 (1881) (district court is required to make explicit the prosecution's obligation to prove the necessary causal connection).

render the statute unconstitutional as applied is of particular concern in this case where there was substantial evidence that if the defendant had solicited the killing of Marlin Shuler, he might have done so for personal reasons, unrelated to the continuing criminal enterprise.

The evidence of an enterprise-related motive--that the killing was in retaliation for the arrest of Donna Shuler in March 1989--was weak. The only witness to the killing was Jarrell, the triggerman, and the only explanation he offered as to Mr. Chandler's reason for soliciting Shuler's death was that Shuler had caused and threatened to continue to cause the family "trouble". (RVI-222; RVII-8, 10-11) Moreover, Jarrell testified that Chandler spoke to him about killing Shuler three or four months before May 8, 1990 (RVI-219; RVII-7-8), long before the search of Donna Shuler's home which occurred on March 2, 1990 (RX-43), and long before she received the affidavit which identified Shuler as an informant on April 27, 1990. (RX-122) Hence, the record would support a jury finding that if Mr. Chandler solicited the murder, he did so for personal reasons prior to, and absent any belief that, Shuler was an informant.

Furthermore, the jury could easily have rejected the prosecutor's claim that Mr. Chandler ever had such a belief. The central evidence bearing on whether Mr. Chandler knew that Shuler had cooperated with the Piedmont police consisted of a piece of paper found in Mr. Chandler's home with the words "copy of police report" and the name of Donna Shuler's attorney. (Gov. Exh. 85) Shuler's name did not appear on the notes, and no effort was made by the prosecution to establish that the handwriting was Mr. Chandler's. The prosecution provided no explanation of why Mr. Chandler planned a murder to protect Donna Shuler, a low-level distributor in the enterprise, when he made no effort to retaliate against the informant who caused Mr. Chandler's own arrest in Georgia on May 30, 1989. (RVI-84-87)

In light of the evidence presented in this case, the ambiguous phrasing read to the jury could easily have resulted in an unconstitutional death penalty. If the jury had been instructed to

make the proper finding—the finding that all parties concede the statute requires--it might have refused to do so. Given this fatal ambiguity, this Court should not permit Mr. Chandler's death sentence to stand.

VI. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE ELEVENTH CIRCUIT'S OVERLY RESTRICTIVE INTERPRETATION OF 28 U.S.C. § 455(a).

In the course of ruling on a pretrial motion the district court stated that Jarrell would do anything for Mr. Chandler, implying that Jarrell would even murder for Mr. Chandler: "Jarrell was an alcoholic lacky [sic] for Chandler who for $500, or maybe simply a fifth of liquor, likely would have done anything Chandler directed him to do." (RI-201) Petitioner moved for recusal pursuant to 28 U.S.C. § 144 and 455, claiming that this statement, tantamount to making a decision as to Mr. Chandler's guilt prior to trial, demonstrated the court's lack of impartiality. This motion was denied. The Eleventh Circuit upheld the district court's denial of Mr. Chandler's recusal motion, following Eleventh Circuit precedent that bias arising from judicial proceedings is generally not a proper basis for recusal. Op. at App. A49-A50.

Section 455(a) states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Petitioner submits that § 455(a) was meant to address judicial bias of any kind, regardless of how such bias arises. This issue is currently before this Court in another Eleventh Circuit case, *Liteky v. United States*, 973 F.2d 910 (11th Cir. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2412 (1993). As a remand would be necessary if the Court revises the Eleventh Circuit's rule in *Liteky*, the Court should, at minimum, hold this case pending the outcome of *Liteky*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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